Raja Segaran a/l S Krishnan v Bar Council Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–23–93 OF 1999
KAMALANATHAN RATNAM J
19 NOVEMBER 1999

Legal Profession *— Malaysian Bar — Resolution to appoint board to make inquiries and recommendations to restore confidence in judiciary — Attempt to by pass constitutional safeguard under art 125 of Federal Constitution — Whether amount to contempt of court and sedition — Whether ultra vires powers of Legal Profession Act 1976 — Whether Malaysian Bar can be injuncted from holding meeting to discuss such resolutions — Whether granting of injunction tantamount to impinging right to freedom of speech and gagging the Bar*

The plaintiff is a member of the Malaysian Bar ('the third defendant'). He received a notice of an EGM of the Bar scheduled to be held on 20 November 1999. The notice resolved that the Bar Council ('the first defendant') would call for the appointment of a Royal Commission of Inquiry to make inquiries and recommendations as may be appropriate to ensure that confidence in the Malaysian judiciary is fully restored. On 2 November 1999, the plaintiff wrote a letter to the defendants requesting that the EGM be called off. On 3 November 1999, a member of the first defendant contacted the plaintiff and informed him that the EGM was called primarily because of the allegations made against the judiciary in an affidavit filed in respect of Civil Suit No S2–23–43–96. The plaintiff then issued a writ seeking for an injunction to restrain the defendants from holding the EGM. It was submitted that if the EGM was held and/or the resolutions adopted, the third defendant including the first defendant and every member who attended the EGM would be guilty of contempt of court. Discussions relating to the on going Civil Suit No S2–23–42–96 would tantamount to discussing matters which were sub-judice. Further, by its conduct, the first defendant was acting mala fide and in abuse of its powers and/or was acting ultra vires the provisions of and scope of the Legal Profession Act 1976 ('the LPA') and even constitute an offence under the Sedition Act 1948. The defendants submitted that granting the injunction would be tantamount to impinging upon the right to freedom of speech and gagging the Bar. The defendant also filed an application to strike out the writ and the statement of claim on the ground that the wrong parties had been sued. It was also submitted that when seeking an injunction, the plaintiff must show the existence of illegality or a breach of a contract or that there was an attempt to perform an ultra vires act. It was submitted that the plaintiff could not apply for an injunction to prevent a contempt from occurring.

Held, allowing the plaintiff's application:

(1) The third defendant, established as a body corporate pursuant to s 41 of the LPA, has the statutory duty of representing, protecting

and assisting members of the legal profession. Pursuant to s 47 of the LPA, the Bar Council exists 'for the proper management of affairs of the Malaysian Bar'. Since the plaintiff would not know who were going to speak at the EGM and who would vote in favour of the EGM, the proper parties to have been sued are the present defendants (see p 12G–H).

(2) The plaintiff was not preventing the defendants from calling for an EGM to discuss matters within the powers conferred upon it. The defendants were attempting to discuss by way of the resolutions matters that were clearly ultra vires the powers conferred by the LPA upon the defendants. The right to freedom of speech ought to be accepted so long as no wrongful act was done. The defendant could not in all honesty say that their conduct was such that no wrongful act would be done. Possible contempt proceedings and criminal charges for sedition were obvious instances of wrongful acts emanating from the defendants' desire to proceed with the EGM and discussing the resolutions. Far from attempting to gag the Bar, the plaintiff was genuinely concerned with preventing the Bar from failing to see reason (see pp 14G–H, 15G–H, 16A).

(3) The resolution was self-culpable as it talked of the competence of the judiciary as being undermined to the detriment of the rule of law in Malaysia. There was a clear assertion in the first defendant's resolution that there was a need to fully restore the public's confidence in the Malaysian judiciary. Such utterances as contained in the resolution were clearly contemptuous. It was obviously an attempt to erode public confidence in the judiciary, by the very persons whose avowed vocation ought to be to protect it (see p 19I, 20G–I).

(4) The call for the Royal Commission of Inquiry was an attempt to by pass a constitutional safeguard because, under the constitutional procedure pursuant to art 125 of the Federal Constitution, there were no provisions for making such vague and opaque general allegations against the entire judiciary. Pursuant to the procedures set out, the complaint must be specific and the judge against whom such a complaint was to be made must be properly identified to enable him to defend himself. This attempt to surreptitiously circumvent art 125 by the very officers of the court who appear before the judges lent weight to the submission of the plaintiff that the defendants' conduct was mala fides (see p 22A–B, D).

(5) By attempting to discuss the matters arising out of Civil Suit No S2–23–42–1996 which is pending continuation of trial, the members of the third defendant and the first and second defendants would be discussing issues that are clearly sub-judice. Further, the attempt to discuss contempt cases already decided by the High Court is still prohibited because of the pending appeals to the Court of Appeal (see p 22F–G).

(6) None of the subsections to s 41(1) of the LPA can be said to provide the defendants with a right to propose the resolutions in question. Acting ultra vires the provisions, namely to by pass art 125 of the Federal Constitution and to call for a Royal Commission of Inquiry clearly does not fall within any of the objects and powers conferred upon the Bar pursuant to s 42 of the LPA. If the defendants could not slot their case within any of the provisions of s 42, then clearly their conduct was ultra vires. The plaintiff being a member of the third defendant had a right to sue to restrain the defendants from committing an act which was ultra vires (see p 24E–G).

(7) The conduct of the defendants and the members of the third defendant if allowed to attend the EGM and to discuss the resolutions would appear to constitute an offence under s 4(1)(a) read together with s 3(1)(c) of the Sedition Act 1948. However, it was not the court's duty to make any finding as to whether an offence had or had not been committed under the said sections. In any event, the plaintiff in actual fact was protecting the defendants from plunging into an abyss from which they could not emerge unscathed (see p 25E–G).

(8) Having considered all matters and issues raised, the court found that the justice of the case from all fronts pointed conclusively to the fact that it was appropriate to grant the plaintiff his interim injunction (see p 26A).

[Bahasa Malaysia summary

Plaintif merupakan ahli Majlis Peguam Malaysia ('defendan ketiga'). Beliau telah menerima satu notis EGM Majlis tersebut yang akan diadakan pada 20 November 1999. Notis tersebut membuat ketetapan bahawa Majlis Peguam ('defendan pertama') akan memerlukan penubuhan satu Suruhanjaya Diraja Siasatan untuk membuat siasatan dan cadangan yang mana bersesuaian bagi memastikan bahawa keyakinan di dalam badan kehakiman Malaysia dikembalikan sepenuhnya. Pada 2 November 1999, plaintif telah menulis sepucuk surat kepada defendan-defendan meminta agar EGM tersebut dibatalkan. Pada 3 November 1999, seorang ahli defendan pertama telah menghubungi plaintif dan memaklumi beliau bahawa EGM tersebut diadakan terutamanya disebabkan oleh dakwaan-dakwaan yang dibuat terhadap badan kehakiman di dalam satu afidavit yang telah difailkan berhubung dengan Guaman Sivil No S2–23–43–96. Plaintif kemudiannya telah mengeluarkan satu writ yang memohon satu injunksi untuk menghalang defendan-defendan daripada mengadakan EGM tersebut. Adalah dihujahkan bahawa sekiranya EGM tersebut diadakan dan/atau resolusi-resolusi tersebut diterima, defendan ketiga termasuk defendan pertama dan setiap ahli yang hadir ke EGM tersebut akan bersalah kerana menghina mahkamah. Perbincangan-perbincangan berkaitan dengan Guaman

Sivil No S2–23–42–96 yang masih berjalan akan sama seperti membincangkan perkara-perkara yang sub-judice. Tambahan pula, kelakuan defendan pertama merupakan satu tindakan yang mala fide dan menyalahgunakan kuasanya dan/atau bertindak ultra vires peruntukan-peruntukan dan skop Akta Profesyen Undang-Undang 1976 ('APU') dan juga boleh menjadi satu kesalahan di bawah Akta Hasutan 1948. Defendan-defendan menghujahkan bahawa kebenaran injunksi tersebut akan sama seperti mencerobohi hak kebebasan bercakap dan menyekat Majlis tersebut. Defendan juga telah memfailkan satu permohonan untuk membatalkan writ dan pernyataan tuntutan tersebut atas alasan bahawa pihak-pihak yang salah telah disaman. Adalah juga dihujahkan bahawa apabila memohon satu injunksi, plaintif perlu menunjukkan kewujudan ketidaksahan atau satu pelanggaran kontrak atau bahawa terdapat cubaan untuk melaksanakan satu tindakan ultra vires. Adalah dihujahkan bahawa plaintif tidak boleh memohon satu injunksi untuk menghalang satu penghinaan daripada berlaku.

Diputuskan, membenarkan permohonan plaintif tersebut:

(1) Defendan ketiga, satu badan korporat yang mantap menurut s 42 APU, mempunyai kewajipan statutori untuk mewakili, melindungi dan membantu ahli-ahli profesion guaman. Menurut s 47 APU, Majlis Peguam wujud 'bagi pengurusan betul urusan-urusan Majlis Peguam Malaysia'. Memandangkan plaintif tidak mungkin tahu siapa yang akan bercakap di EGM tersebut dan siapa yang akan mengundi di pihak EGM, pihak-pihak yang sepatutnya disaman adalah defendan-defendan pada masa itu (lihat ms 12G–H).

(2) Plaintif tidak menghalang defendan-defendan daripada mengadakan satu EGM untuk membincangkan perkara-perkara di dalam kuasa yang diberikan kepadanya. Defendan-defendan telah cuba untuk berbincang melalui perkara-perkara yang diresolusikan tersebut yang dengan jelas adalah ultra vires kuasa-kuasa yang diberikan oleh APU ke atas defendan-defendan. Hak kebebasan bercakap sepatutnya diterima kecuali jika ada berlakunya tindakan yang salah. Defendan tidak mungkin dengan sebenar-benarnya mengatakan bahawa perbuatan mereka adalah sedemikian sehingga tiada tindakan yang salah mungkin berlaku. Kemungkinan prosiding penghinaan dan pertuduhan jenayah kerana menghasut merupakan keadaan-keadaan tindakan-tindakan salah yang jelas datang daripada hasrat defendan-defendan untuk meneruskan EGM dan membincangkan resolusi-resolusi tersebut. Jauh daripada cubaan untuk menyekat Majlis tersebut, plaintif telah dengan ikhlas mengambil berat untuk menghalang Majlis tersebut daripada gagal memberi pertimbangan yang munasabah (lihat ms 14G–H, 15G–H, 16A).

(3) Resolusi tersebut adalah dengan sendirinya salah kerana ia membicarakan tentang kompetens badan kehakiman yang

semakin lemah yang menjejaskan kedaulatan undang-undang di Malaysia. Wujud kenyataan yang jelas di dalam resolusi defendan pertama bahawa terdapat keperluan untuk mengembalikan sepenuhnya keyakinan masyarakat di dalam badan kehakiman Malaysia. Pernyataan-pernyataan sedemikian sebagaimana terkandung di dalam resolusi tersebut adalah dengan jelas penuh dengan kebencian. Adalah jelas terdapat satu cubaan untuk menghakis keyakinan masyarakat di dalam badan kehakiman, oleh orang-orang yang mengakui dirinya mempunyai sifat yang sesuai untuk melindunginya (lihat ms 19I, 20G–I).

(4) Keperluan untuk Suruhanjaya Diraja Siasatan itu merupakan satu cubaan untuk memintas satu pelindungan perlembagaan di bawah prosedur perlembagaan kerana, di bawah perkara 125 Perlembagaan Persekutuan, tiada terdapat sebarang peruntukan untuk membuat dakwaan-dakwaan umum yang tidak jelas dan sukar difahami sedemikian terhadap keseluruhan badan kehakiman. Menurut prosedur yang dinyatakan, aduan itu perlu khusus dan hakim yang mana aduan tersebut dibuat perlulah dikenalpasti dengan betul bagi membolehkan beliau membela dirinya. Cubaan untuk secara curi-curi memintasi perkara 125 oleh pegawai-pegawai mahkamah yang hadir di hadapan hakim-hakim tersebut menyokong hujahan plaintif bahawa kelakuan defendan adalah mala fide (lihat ms 22A–B, D).

(5) Dengan percubaan untuk membincangkan perkara-perkara yang timbul daripada Guaman Sivil No S2–23–42–96 yang menunggu sambung bicara, ahli-ahli kepada defendan ketiga dan defendan pertama dan kedua akan membincangkan perkara-perkara yang dengan jelas sub-judice. Tambahan pula, cubaan untuk membincangkan kes-kes penghinaan yang telahpun diputuskan oleh Mahkamah Tinggi masih tidak dibenarkan kerana menunggu rayuan-rayuan ke Mahkamah Rayuan (lihat ms 22F–G).

(6) Tiada satupun daripada subseksyen-subseksyen s 41(1) APU boleh dikatakan telah memberikan defendan-defendan hak untuk mencadangkan resolusi-resolusi yang dipersoalkan tersebut. Perlakuan ultra vires peruntukan-peruntukan tersebut, terutamanya, memintas perkara 125 Perlembagaan Persekutuan, dan perbuatan memanggil suatu Suruhanjaya Diraja Siasatan, dengan jelas tidak terkandung di dalam mana-mana tujuan-tujuan atau kuasa-kuasa yang diberikan kepada Majlis tersebut menurut s 42 APU. Sekiranya defendan-defendan tidak boleh memasukkan kes mereka di dalam mana-mana peruntukan-peruntukan s 42 itu, maka adalah jelas kelakuan mereka ultra vires. Plaintif yang merupakan seorang ahli kepada defendan ketiga mempunyai hak untuk bertindak menyaman bagi menghalang defendan-defendan daripada melakukan satu tindakan yang ultra vires (lihat ms 24E–G).

(7) Kelakuan defendan-defendan dan ahli-ahli kepada defendan ketiga jika dibenarkan hadir ke EGM dan membincangkan resolusi-resolusi tersebut akan kelihatan seperti satu kesalahan di

bawah s 4(1)(a) dibaca bersama dengan s 3(1)(c) Akta Hasutan 1948. Bagaimanapun, bukanlah tugas mahkamah untuk membuat apa-apa penemuan terhadap sama ada satu kesalahan telahpun atau tidak dilakukan di bawah seksyen-seksyen tersebut. Di dalam apa keadaanpun, plaintif sebenarnya telah melindungi defendan-defendan daripada terjerumus ke dalam jurang yang amat dalam yang mereka tidak boleh keluar terselamat (lihat ms 25E–G).

(8) Setelah mempertimbangkan semua perkara-perkara dan isu-isu yang telah dikemukakan, mahkamah mendapati bahawa keadilan di dalam kes ini daripada semua segi menunjukkan tanpa dapat dipertikaikan lagi kepada hakikat bahawa ia adalah bersesuaian untuk memberikan plaintif injunksi interim beliau (lihat ms 26A).]

Notes

For cases on the Malaysian Bar/Law Society, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1452–1457.

Cases referred to

Advocate General v Seshagiri Rao [1966] 53 AIR 167 (refd)
Aswini Kumar v Arabina Bose AIR 1953 SC 75 (refd)
Attorney General v Fred Zimmerman & Ors [1986] 2 MLJ 89 (refd)
Bonnard v Perryman [1891] 2 Ch 269; [1891–94] All ER Rep 965 (refd)
Chandra Sri Ram v Murray Hiebert [1997] 3 MLJ 240 (refd)
David Lau Tai Bek v Lau Ek Ching Sdn Bhd [1972] 1 MLJ 217 (refd)
DP Vijandran v Majlis Peguam [1995] 3 MLJ 576 (refd)
Femis-Bank (Anguilla) Ltd & Ors v Lazar & Anor [1991] 2 All ER 865 (refd)
Gallagher v Durack (1983) 57 ALJR 191 (refd)
Gibb & Co v Malaysia Building Society Bhd [1982] 1 MLJ 271 (refd)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (refd)
Muhammad Wasim, Re (1933) 34 Cr LJ 726 (refd)
NWL Ltd v Woods [1979] 1 WLR 1294 (refd)

Legislation referred to

Federal Constitution art 125
Sedition Act 1948 ss 3(1)(c), 4(1)(a), 5
Legal Profession Act 1976 ss 42(1)(a), (e), (g), 47

DP Vijandran (*Raja Segaran & Associates*) for the plaintiff.

Lim Kean Chye (*Peter Mooney, Dominic Puthucheary, Ambiga Sreenevasan, Robyn YH Choi* and *Tuan Shaikh Abdul Saleem* with him) (*Shearn Delamore & Co*) for the defendants.

Cur Adv Vult

Kamalanathan Ratnam J:

The application

This is an application by the plaintiff (encl 3) for an injunction to restrain the defendants by themselves and/or their servants and/or agents from holding an extraordinary general meeting ('the EGM') scheduled to be held on 20 November 1999 at the Grand Ballroom, Renaissance Hotel, Kuala Lumpur ('the venue'). There was also a prayer for costs.

Matters leading to this application

The plaintiff is a member of the Malaysian Bar ('the Bar'). He received a notice of an EGM of the Bar scheduled to be held on 20 November 1999 at 10am at the said venue.

Contents of the notice

The said notice is reproduced in full as it is necessary for the court's consideration of this application.

Notice

Extraordinary General Meeting Of The Malaysian Bar

Notice is hereby given that an Extraordinary General Meeting of the Malaysian Bar will be held on Saturday, 20 November 1999 at 10am at the Grand Ballroom, Renaissance Hotel, Kuala Lumpur to consider and, if approved, to adopt the Motion proposed by the Bar Council as follows:

Whereas:

(1) The Malaysian Bar recognizes:

(a) that freedom in any democratic state is not only economic well-being and the absence of aggression but also the presence of justice and the rule of law;

(b) and is committed, to the principle that the Judiciary is a vital and fundamental organ of a democratic state and the final arbiter of justice according to the rule of law; and

(c) that vitally important and inherent to the role of the Judiciary is the ability to command confidence in its independence, integrity and competence.

(2) The Malaysian Bar:

(a) understands that serious allegations of impropriety have been made against certain members of the Judiciary; and

(b) is gravely concerned with judicial developments and pronouncements in certain important branches of law such as the law of contempt and the law of defamation, and with the administration of justice generally.

(c) It is the grave concern of the Malaysian Bar that by reason of these allegations, developments and pronouncements confidence in the independence, integrity and competence in the Judiciary has been undermined to the detriment of the rule of law in Malaysia.

It is hereby resolved:

That the Bar Council is to forthwith bring to the attention of the appropriate authorities all relevant instances of controversy that have undermined confidence in the Malaysian Judiciary and to do all that is necessary to pursue the appointment of a Royal Commission of Inquiry to make such inquiries and recommendations as may be appropriate to ensure that confidence in the Malaysian Judiciary is fully restored.

Dated : 12 October 1999

Sgd
Roy Rajasingham
Secretary

Note

1 Members are kindly requested to make every effort to attend the meeting punctually to ensure that the quorum, which is 1/5 of the total number of [8,563] members of the Malaysian Bar, is reached within half an hour, that is by 10.30am;

2 Registration counters will be opened as from 8.30am when light refreshments will be served;

3 In order for the motion to be carried, two-thirds of the members present and voting should support it;

4 Accommodation is available at the Renaissance Hotel at RM200 nett for deluxe room exclusive of breakfast and RM230 nett for deluxe room inclusive of breakfast or at the New World Renaissance at RM170 nett for superior room. Please book directly with the Hotels at Tel No 2622233 ext 3350 (Cik Norma: Reservations).

5 *Pupils* can attend but shall not vote and shall be seated only at a designated area.

The said EGM has been called by the first defendant on its own motion without any requisition from its members. On 2 November 1999, the plaintiff wrote to the defendants requesting that the said EGM be called off and he gave them 72 hours within which to do so. It is also important to reproduce the contents of the plaintiff's letter in full. The said letter reads as follows:

2 November 1999

To : Secretary of the Bar Council
c/o Roy Rajasingam s/o C Vallipuram
Reginald Vallipuram & Co
Suite 1, 23rd Floor,
Kompleks Tun Razak,
Jalan Wong Ah Fook,
80000 Johore Bahru,
Johor

By Fax
Fax No : 07-2241939

A

Chairman of the Bar Council
c/o RR Chelvarajah
Sault & Co
No 64, Lorong Hang Jebat,
75200 Melaka

By Fax
Fax No : 06-2846244

B

Executive Director of the Bar Council
No 5, Jalan Tun Perak
50050 Kuala Lumpur

By Hand

Dear Sirs,

Extraordinary General Meeting of the Malaysian Bar on 20 November 1999

C

I am a member of the Bar since 1995 with a membership number of BC/R/350 and I refer to the above whereby I have received a Notice to attend the said Extraordinary General Meeting ('the said meeting').

With respect, I'm of the view that the holding of the said meeting to discuss and/or adopt the proposed resolutions would constitute a contempt of court.

D

In the circumstances, I would strongly urge the Bar Council to immediately take the necessary steps to call off the said meeting. If the meeting is held and/or the resolutions adopted, I fear that the Malaysian Bar including the Bar Council and every member who attends the said meeting will be guilty of contempt of court.

E

Accordingly, there is very high likelihood that proceedings for contempt may be taken against us. This would entail serious consequences for the entire Bar which are as follows:

(1) the Bar Council will face proceedings for contempt and for holding the said meeting and initiating the said resolutions.

F

(2) the members who attend the said meeting will also be in jeopardy as they will face proceedings for contempt for participating in such a meeting.

(3) the entire Malaysian Bar will have to bear the brunt of the costs involved in defending the above proceedings. In this respect, I regretfully draw your attention to the enormous cost of RM600,000 that we have had to pay in another matter.

G

We must also be wary of the fact that some of the matters intended to be discussed may well be sub-judice.

Further, the holding of the said meeting and/or the adoption of the said resolutions will cause irreparable damage to the image, integrity and independence of the judiciary which we as members of the Bar are beholden to protect.

H

Please Take Notice that as a member of the Malaysian Bar, I strongly urge the said meeting to be called off.

Please Take Further Notice that if I do not receive a written confirmation from you that the said meeting has been called off within seventy-two (72) hours of the receipt of this letter, I shall have no alternative but to apply to court for appropriate remedies.

I

I beseech you to give serious and urgent consideration to this letter. I am indeed very unhappy that we are becoming increasingly embroiled in matters that should be left to the protagonists to work out. I have the best interest of

the Bar at heart. I do hope that good counsel will prevail. Let us fight only the fights that we should fight and fight them within the scope of our charter.

Yours faithfully,

Sgd

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Rajasegaran s/o S Krishnan

A member of the first defendant then contacted the plaintiff on 3 November 1999 with regard to the contents of the plaintiff's letter dated 2 November 1999. The plaintiff was informed by the said member that the said EGM was called primarily because of certain allegations made against the judiciary in an affidavit filed in respect of Kuala Lumpur High Court Civil Suit No S2–23–42–96. There was however no official communication or response from the first defendant in respect of the plaintiff's said letter. The plaintiff then issued a writ in which he sought the interim injunction prayed for in the application, together with a prayer for a permanent injunction to restrain the defendants either by themselves and/or through their servants and/or their agents from holding and/or causing to be held any further meetings that constitute contempt and/or an abuse of power and/or a contravention of the Sedition Act 1948, and damages and costs. In a further affidavit the plaintiff averred that he was informed that the holding of the proposed EGM would cost approximately RM75,000 which sums would have to be paid from the funds belonging to the Bar. He further pointed out that as of late whilst there had been a spate of complaints against a senior member of the Bar, namely, Mr Karpal Singh, for alleged unprofessional conduct and/or for acting in contravention of the provisions of the Legal Profession Act 1976 ('the LPA') and the subsidiary legislation made thereunder in acting as counsel for the former Deputy Prime Minister after having earlier been consulted by the accusers of the said Deputy Prime Minister and having publicly called for an enquiry into the very matters upon which he is now defending as counsel, the said Deputy Prime Minister, the first defendant had taken the view that such matters ought to be referred to the disciplinary board which is empowered by law to enquire into such matters. The plaintiff averred that on the same basis, the first defendant, if it had received allegations against the judiciary, ought to have taken the stand that such matters ought to be referred to the body set up for such purposes under art 125 of the Federal Constitution. But more on this later.

Plaintiff's application to amend

Since the matter was filed with a certificate of urgency on 9 November 1999, I directed my Deputy Registrar to fix the hearing of the plaintiff's application (encl 3) on 13 November 1999. On that day, Mr Vijandran for the plaintiff requested that I hear encl 12 first. This was an application by the plaintiff to include as the third defendant, the Malaysian Bar ('the Bar'), since pursuant to the LPA, the third defendant is described as a body corporate established under the said LPA. There were further amendments sought as additional prayers in the statement of claim. The new prayers were for:

(a) A declaration that the said EGM and the said proposed resolution are ultra vires the LPA.

(b) A declaration that the said EGM and the said purported resolution constituted a contempt of court.

(c) A declaration that the said EGM and the said proposed resolution constituted offences under the Sedition Act 1948.

With the consent of the defence I heard encl 12. Since Mr Lim for the defendants had no objections to the application because he intended to deal with the matters arising out of the application to amend in his application to strike out the writ and statement of claim I granted an order in terms of the plaintiff's application to amend with costs in the cause. Since Mr Lim again had no objections to the plaintiff's request that the various summonses in chambers be taken as accordingly amended, I gave a further order to that effect.

Mr Vijandran then asked if the defendants would agree to proceed on the basis that the third defendant had been served. He suggested that since the President and the Secretary of the Malaysian Bar were present in court they could undertake to appear on the record, subject to being served and for the third defendant to undertake to enter appearance. He pointed out that if the defendants did not agree then he had no choice but to ask for a short adjournment to serve the Malaysian Bar with the amended writ and statement of claim and to proceed on another day. Mr Lim then submitted that since it was his clients' desire to have the matter resolved as speedily as possible and since it was only academic whether the Malaysian Bar is made a party, he agreed to Mr Vijandran's proposal that the Malaysian Bar be deemed to have been served with the amended writ and statement of claim and that it be taken that it has appeared. He also applied that the third defendant be allowed to join in the application to strike out the writ as if it was a party right from the beginning. He also asked for leave that the third defendant be allowed to rely on the affidavits so far filed by the defendants and upon the inherent jurisdiction of the court to protect itself from applications of this kind. After a short adjournment to enable Mr Lim to take instructions he confirmed that he had instructions to appear on behalf of the third defendant. I then proceeded to hear encl 9.

Defendants' application to strike out the writ and statement of claim (encl 9)

Mr Lim argued that the wrong parties had been sued. It was his submission that the existing defendants were not the persons who would pass the resolutions in question. They were the members of the Bar. He pointed out that the said resolutions would be decided at a closed door meeting, open only to individual members of the Bar. When Mr Lim suggested that neither the Bar Council nor the Bar could represent members of the Bar as far as the meeting was concerned, I referred him to the notice which expressly stated that it was a motion proposed by the Bar Council itself. Mr Lim replied that the Bar Council acted only as a conduit pipe in issuing the said notice. He proposed that the meeting be allowed to be held and to await the outcome. He questioned the wisdom of this application for an injunction.

Assuming the injunction was granted and yet in defiance thereof, if the defendants continued to hold the meeting and then threw out the resolutions, he pointed out the futility of the injunction. If there were any seditious utterances, it was Mr Lim's view, that a complaint ought to be made to the Attorney General whose sanction was required for any such prosecution under s 5 of the Sedition Act 1948. It was his submission that the second defendant should have been sued as representing the Advocates and Solicitors of the Malaysian Bar in a representative or class action. It was his further submission that the Bar Council represented the members of the Bar for a public image. To a question by the court Mr Lim agreed that assuming the resolutions were passed the first and third defendants were bound to adopt the said resolutions.

Mr Lim then submitted that when seeking an injunction the plaintiff must show the existence of illegality or a breach of a contract or that there was an attempt to perform an ultra vires act. It was his submission that the plaintiff cannot apply for an injunction to prevent a contempt from occurring. He has to wait to see if a contempt has been committed as intention was vital and this would only be known when the resolutions were passed. The only remedy allowed the plaintiff is to apply to commit to prison for a contempt pursuant to the Rules of the High Court 1980 after a contempt has been committed.

To my mind the submission of Mr Lim that the wrong parties have been sued is unacceptable. It is pertinent to state the relevant provisions of the LPA relied on by the defence in their affidavit in reply. They are subss 42(1)(a), (e) and (g) of the LPA which read as follows:

> (1) The purpose of the Malaysian Bar shall be —
>
> (a) to uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour;
>
> ...
>
> (e) to represent, protect and assist members or of the legal profession in Malaysia and to promote in any proper manner the interests of the legal profession in Malaysia;
>
> ...
>
> (g) to protect and assist the public in all matters touching ancillary or incidental to the law;

Therefore the third defendant, established as a body corporate pursuant to s 41 of the LPA, has the statutory duty of representing, protecting and assisting members of the legal profession. Pursuant to s 47 of the LPA the Bar Council exists 'for the proper management of the affairs of the Malaysian Bar'. I accept the submission of Mr Vijandran that since the plaintiff would not know who were going to speak at the EGM and who would vote in favour of the EGM, the proper parties to have been sued are the present defendants.

Mr Vijandran submitted that it is the plaintiff's case that the very discussion let alone the adoption of the resolutions that would amount to contempt, constitute an act of sedition and be held ultra vires. Having heard the full arguments, I adjourned for a short while and delivered my ex

tempore judgment which I now record verbatim my decision as recorded in my notes of evidence:

Application to strike out

On the first issue that the wrong parties have been sued, it is clear to me, upon reading the resolution (exh RRC-1 to encl 8) that the proposer of the resolution in question is the Bar Council.

In the circumstances, I find that the Bar Council is properly named as the first defendant. In respect of the argument that Mr Chelvarajah ought to have been sued as if in a class action, I am of the view that that is what has been done. He is being sued (as acting on behalf of all members of the Bar Council) since the Bar Council represents the Bar (see s 42(1)(e) of the LPA). There is therefore no need for him to have been sued as representing all members of the Bar. As for the argument that the Bar Council is not going to pass the resolutions, it is obvious that the persons whom it represents will be discussing the resolutions with a view to either passing them or rejecting them. The submission that the defendants are being accused of doing something beyond their control is the reason why a concerned member of the third defendant is applying to stop these resolutions. In the circumstances leave must be given for this concerned member, and there might be many like him, to give his reasons for the course of action he has taken.

As to the rest of the issues raised by Mr Lim, those arguments relating to whether the plaintiff can bring this action to stop a fear of contempt being committed, or a fear of a possible charge under the Sedition Act, these arguments ought to be reserved for the hearing of the application proper. To a question from the court, Mr Lim in his usual forthright manner conceded that if the resolutions are passed the first and third defendants would adopt those resolutions as they are bound to do so. In the circumstances, I am satisfied that the plaintiff has raised sufficient issues to warrant a dismissal of this application to strike out with costs.

Sgd Dato' Dr Kamalanathan Ratnam

I then proceeded to hear encl 3.

Enclosure 3

There is no dispute that the plaintiff was and is a member of the Bar. A copy of his practising certificate was exhibited. He has also been paying his subscriptions.

Conduct of the plaintiff

The plaintiff has averred in his affidavit in support of this application that he did not begin these proceedings in haste or without due consideration. He pointed out that upon receipt of the notice regarding the EGM he had spent 'considerable time talking with other members of the Bar about the EGM'. He had planned to collect signatures to present to the first defendant to stop the EGM but gave up the said idea as it proved impracticable and further for reason that he was constrained for time. Subsequently he argued that he had made a bona fide attempt to prevent the holding of the same EGM by appealing to the first defendant through his letter dated 2 November 1999. In the said letter, which I have

reproduced in full, he pointed out his fears and the possible serious consequences. He raised the issue of sub judice if matters proposed in the resolutions were discussed. He implored the defendants not to cause 'irreparable damage to the image, integrity and independence of the judiciary which we as members of the Bar are beholden to protect'. He beseeched the defendants to call off the meeting and urged them 'to fight only the fights that we should fight and fight them within the scope of our Charter'. He was quick to point out that he was making his application after having exhausted the non-confrontational approach, in the best interest of the Bar.

Contact by a member of the first defendant

After he had sent the said letter he averred that a member of the first defendant contacted him and informed him that the EGM was called primarily because of the allegations made against the judiciary in an affidavit filed in respect of Kuala Lumpur High Court Civil Suit No S2–23–43–96. In the course of his submissions Mr Lim contended that the plaintiff did not have the guts to name the member of the first defendant who had contacted him so that that member could reply to him and that in the circumstances I ought to reject this averment in the affidavit.

Officer of the court

Mr Lim for the defendants argued that the plaintiff had no right to describe himself as an officer of the court. When I asked him if he had any authority to propose such a contention he replied that he was merely relying on the provisions of the LPA which does not define an advocate and solicitor as an officer of the court.

I do not with respect accept this submission. All practising advocates and solicitors are officers of the court and it is in that sense that they owe a duty to the court to act with propriety, honesty, diligence and fortitude. To suggest otherwise is to place an advocate and solicitor in a similar position as the court's janitor.

Freedom of speech

The thrust of the defence argument is that granting this injunction would be tantamount to impinging upon the right to freedom of speech. The short answer to this is that the plaintiff is not preventing the defendants from calling for an EGM to discuss matters within the powers conferred upon it. The plaintiff's complaint is that the defendants are attempting to discuss by way of these resolutions, matters that are clearly ultra vires the powers conferred by the LPA upon the defendants. Freedom of speech must have its own constraints. Unbridled freedom of speech is obviously an open licence to incite hatred and discontent amongst the people. Therefore, the courts are ever watchful and maintain a firm hand to ensure that the concept of freedom of speech, is not abused. So long as the matters discussed or spoken do not transgress the set laws of the land freedom of

speech is the hallmark of an independent nation. However, it cannot be denied that ruthless manipulators would insist upon the right to freedom of speech and yet at the same time insidiously undermine like the receding tide, the accepted concept of freedom of speech.

Gagging the Bar

Mr Lim argued that this application, if allowed would be tantamount to gagging the Bar. In support of this view, the court was referred to the decision in *Femis-Bank (Anguilla) Ltd & Ors v Lazar & Anor* [1991] 2 All ER 865. In this case the defendants published a series of allegations that the plaintiffs, who controlled an off-shore banking operation which transferred investments to an English trust handling fixed deposits, were financially unsound, dishonest and conducted their business in breach of local laws and regulations in the jurisdiction in which they conducted business. The plaintiffs brought an action for conspiracy against the defendants, alleging that the defendants had conspired to cause damage to the plaintiffs, and sought an injunction restraining the defendants from publishing any further damaging statements until trial of the action, contending that once a prima facie case of conspiracy to injure had been made out the public interest in the freedom of speech was an irrelevant consideration in determining whether an injunction should be granted. The court held that in exercising its discretion to grant an injunction to restrain the publication of damaging statements pending trial of an action for conspiracy to injure the fact that the injunction would interfere with freedom of speech was an important factor to be taken into account and only in the very clearest cases would the interference with the public interest in the freedom of speech be justified by the grant of an injunction. The court refused the injunction on the basis (inter alia) that it was in the public interest that the affairs of the plaintiff's banking operations be open to public discussion. In fact the defendants relied on a quotation from *Bonnard v Perryman* [1891] 2 Ch 269 at p 294; [1891–94] All ER Rep 965 at p 968 adopted by Lord Denning MR in *Fraser v Evans* [1969] 1 All ER 8 at p 10, as representing the basis of the rule to the following effect:

> The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done.

It is clear therefore that the right to freedom of speech ought to be accepted so long as no wrongful act is done. Can the defendants in all honesty say that their conduct is such that no wrongful act will be done. Possible contempt proceedings and criminal charges for sedition are obvious instances of wrongful acts emanating from the defendants' desire to proceed with this meeting and discussing the resolutions.

The defendants argued that this application is an attempt to stop discussions upon a matter of public interest. As I have found earlier so long as the defendants do not transgress any law of the land in their anxiety to ensure the right to freedom of speech, the courts in their desire to uphold justice and the rule of law, would refrain from interfering with such rights

towards freedom of speech and expression. It is my judgment that far from attempting to gag the Bar, the plaintiff is genuinely concerned with preventing the Bar from failing to see reason.

Fears of the plaintiff

The plaintiff feared, as averred in his affidavit in support of the application, that if the said EGM was held and/or the resolutions adopted, the third defendant including the first defendant and every member who attended the said EGM would be guilty of contempt of court and he feared that the first defendant could face proceedings for contempt for holding the said EGM and for initiating the said resolutions and the members present for partaking in the proceedings. He feared the mounting costs and cited an example of a recent decision reported in all the leading newspapers where the first defendant was held liable in costs of RM600,000 to be paid to a lawyer who sued the first defendant. He worried of the adverse effect such resolutions could have on the judiciary and the public's opinion of it. He pointed out the existence of special provisions in the Federal Constitution to deal with any alleged improprieties by judges as set out in art 125. The said relevant sub-articles read as follows:

> 125 Tenure of office and remuneration of judges of Federal Court
>
> ...
>
> (2) A judge of the Federal Court may at any time resign his office by writing under his hand addressed to the Yang di-Pertuan Agong but shall not be removed from office except in accordance with the following provisions of this Article.
>
> (3) If the Prime Minister, or the Chief Justice after consulting the Prime Minister, represents to the Yang di-Pertuan Agong that a judge of the Federal Court ought to be removed on the ground of any breach of any provision of the code of ethics prescribed under Clause (3A) or on the ground of inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office, the Yang di-Pertuan Agong shall appoint a tribunal in accordance with Clause (4) and refer the representation to it; and may on the recommendation of the tribunal remove the judge from office.
>
> (3A) The Yang di-Pertuan Agong on the recommendation of the Chief Justice, the President of the Court of Appeal and the Chief Judges of the High Courts, may, after consulting the Prime Minister, prescribe in writing a code of ethics which shall be observed by every judge of the Federal Court.
>
> (4) The said tribunal shall consist of not less than five persons who hold or have held office as judge of the Federal Court, the Court of Appeal or a High Court or, if it appears to the Yang di-Pertuan Agong expedient to make such appointment, persons who hold or have held equivalent office in any other part of the Commonwealth, and shall be presided over by the member first in the following order, namely, the Chief Justice of the Federal Court, the President and the Chief Judges according to their precedence among themselves, and other members according to the order of their appointment to an office qualifying them for membership (the older coming before the younger of two members with appointments of the same date).

A (5) Pending any reference and report under Clause (3) the Yang di-Pertuan Agong may on the recommendation of the Prime Minister and, in the case of any other judge after consulting the Chief Justice, suspend a judge of the Federal Court from the exercise of his functions.

...

B (9) This Article shall apply to a judge of the Court of Appeal and to a judge of a High Court as it applies to a judge of a Federal Court, except that the Yang di-Pertuan Agong before suspending under Clause (5) a judge of a Court of Appeal or a judge of the High Court other than the President of the Court of Appeal or the Chief Judge of a High Court shall consult the President of the Court of Appeal or the Chief Judge of that High Court instead of the Chief Justice of the Federal Court.

C

The plaintiff urged the defendants not to side step the constitutional provisions provided for by calling for a royal commission of inquiry. He urged the first defendant to consider the fact that discussing matters relating to the on-going Civil Suit S2–23–42–96 would clearly be tantamount to D discussing matters which are sub judice. This would also apply to discussions relating to cases on contempt which are pending appeal. He was appalled he said that a responsible body such as the first defendant could propose a resolution to discuss on the competence and integrity of the judges as he viewed such discussions as being contemptuous. He pointed E out that the adoption just as much as the discussion of the said resolution would constitute contempt. He also pointed out that by its conduct the first defendant was acting mala fides and in abuse of its powers and/or was acting *ultra vires* the provisions and scope of the LPA. He even suggested that the defendants look seriously at ss 3(1)(c) and 4(1)(a) of the Sedition Act 1948.

F The said sections are reproduced herewith:

3 Seditious tendency

(1) A 'seditious tendency' is a tendency —

...

(c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State;

G

4 Offences

(1) Any person who —

(a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act which has or which would, if done, have a seditious tendency; ...

H He lamented the fact that in spite of his letter dated 2 November 1999 he was informed on 6 November 1999 that at a council meeting the members of the first defendant having discussed his said letter, decided to go ahead with the said EGM.

In granting or refusing an interlocutory injunction, I am guided by the I decision of the Court of Appeal in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193. I must ask myself whether there is a bona fide serious issue to be tried. If there is such an issue then I must

ask myself where the justice of the case lies, that is, having taken into account all relevant matters I ought to weigh the harm the injunction would produce by its grant, against the harm that would result from its refusal and whether it would be just to maintain status quo.

Is there a serious question to be tried?

However, the issue here is totally different. The entire writ is premised solely upon stopping this EGM. In the circumstances, it is clear that in deciding whether to grant or not the injunction the question of balance of convenience would play a major deciding factor. In *Gibb & Co v Malaysia Building Society Bhd* [1982] 1 MLJ 271, Abdoolcader J (as he then was), in considering whether a grant of an interlocutory order would in effect be granting the plaintiff the whole relief, had this to say at p 273:

> The short answer to the issue raised in this respect is that the court is not precluded from granting an interlocutory injunction where this would virtually give the applicant therefor on his claim the full relief actually sought to be secured at the final hearing when the matter is viewed on a balance of convenience ...

In deciding this His Lordship had in mind the decision of the House of Lords in *NWL Ltd v Woods* [1979] 1 WLR 1294 where Lord Diplock said at p 1306:

> ... *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, which enjoins the judge upon an application for an interlocutory injunction to direct his attention to the balance of convenience as soon as he has satisfied himself that there is a serious question to be tried, was not dealing with a case in which the grant or refusal of an injunction at that stage would, in effect, dispose of the action finally in favour of whichever party was successful in the application, because there would be nothing left on which it was in the unsuccessful party's interest to proceed to trial.

His Lordship continued at p 1307 thus:

> ... Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Having warned myself that in granting or refusing the plaintiff's application for interim injunction I must have in the forefront of my mind the above referred decisions, I now proceed to look at the matter presented to the court. The plaintiff argued his case resting on three issues.

Contempt

It was the plaintiff's contention that discussing the resolutions, let alone passing them, is an act of contempt. The plaintiff pointed out with reference

to the first defendant's resolution that whilst it started off with conciliatory terms, such as the Bar 'recognises', 'understands', 'is gravely concerned', and further whilst alleging improprieties against 'certain members of the judiciary' only and certain 'judicial developments and pronouncements' only, in preamble (3) of the resolution the Bar has made reference to the 'judiciary' meaning the entire judiciary as a whole. To quote the words of counsel for the plaintiff 'there is a jump in the logic here, and this causes concern'. It was this allegation against the entire judiciary that has moved the first defendant to call for a Royal Commission of Inquiry 'to ensure that confidence in the Malaysian Judiciary is fully restored'. There are to my mind, three attacks made against the judiciary when calling for a Royal Commission of Inquiry. They are the attacks upon the independence, competence and integrity of the judiciary. It is difficult therefore to accept the averment of Mr Chelvarajah when he affirmed an affidavit that the intention of the defendants in calling for the EGM was in fact 'to protect the judiciary'. Preamble (3) to the resolution states as follows: 'confidence in the independence, integrity and competence in the judiciary has been undermined'. I accept the submission of the plaintiff that preamble (3) clearly suggests that the defendants by their choice of words have no longer shown that the issues relating to the undermining of the independence, integrity and competence of the judiciary were mere allegations or suppositions. It is obviously an averment of a fact which it wants its members to adopt. I also accept the argument of Mr Vijandran when he suggested that one can only restore something that is lost and when the first defendant called for a Royal Commission of Inquiry to fully restore the confidence in the Malaysian Judiciary it is axiomatic that the inference is that such confidence has indeed been lost. In the circumstances, the attempt by Mr Chelvarajah to suggest in his affidavit that the resolution was 'to preserve and to affirm the integrity and independence of the judiciary' suggests incoherence of thought. I now have to consider whether such words as attacking the competence, integrity and independence of the judiciary constitute possible contempt. In *Advocate General v Seshagiri Rao* (1966) 53 AIR 167 the respondent who had been convicted of a criminal offence sent a notice to the magistrate who tried him accusing him of incompetence, judicial dishonesty in not adverting to the facts and the law and bias in favour of the prosecution and an insinuation that he was influenced by other considerations. Venkatesam J said at p 170 as follows:

> That these allegations, ex facie, amount to contempt of court, admit of no doubt. They constitute an attack on the competence and integrity of the judicial officers. The consequence of such attacks on their character is to destroy the confidence of people in courts, seriously impair judicial administration, and bring the administration of justice itself into disrepute. It makes no difference that the attacks were made not during the pendency of a proceeding, but after its disposal.

It is appropriate to point out that in the present case there is no need for this court to make any finding or otherwise if there has been any statement with regard to the competence of the judiciary. The resolution itself is self-culpable as it talks of the competence of the judiciary as being undermined to the detriment of the rule of law in Malaysia. In other words it suggests

that the Malaysian judges are so incompetent so much so it has affected the rule of law in Malaysia. Nearer home there is the case of *Attorney General v Fred Zimmerman & Ors* [1986] 2 MLJ 89. The defendant was the editor and publisher of the Asian Wall Street Journal. The Attorney General applied for orders for committal against five respondents for their several contempts of court for publishing, printing and distributing an article about politics in Singapore and which article the Attorney General submitted contained many untruths, half-truths, insinuations and innuendoes affecting the integrity and impartiality of the courts. Sinnathury J held at p 91 of the case that:

> ... In the context of these proceedings, anyone who attacks the integrity or impartiality of a court or a judge commits contempt of court. The reason is simple. It undermines public confidence in the administration of justice.

In *Gallagher v Durack* (1983) 57 ALJR 191, Gallagher was a well-known union leader holding an important office in a large national trade union. After he had successfully appealed to the Full Court of the Federal Court of Australia from a conviction and sentence for contempt of court he stated in an interview with the media that he believed that the actions of the rank and file of the union had been the main reason for the court changing its mind. The Federal Court of Australia (Full Court) through Gibbs CJ, Mason, Wilson and Brennan JJ (Murphy J dissenting) said at p 193:

> It has not been shown that the Federal Court ignored or misapplied proper principles in the present case. The statement by the applicant that he believed that the actions of the rank and file of the Federation had been the main reason for the court changing its mind can only mean that he believed that the court was largely influenced in reaching its decision by the action of the members of the union in demonstrating as they had done. In other words, the applicant was insinuating that the Federal Court had bowed to outside pressure in reaching its decision.

Little further they continued on the same page:

> There can be no doubt that the offending statement amounted to a contempt of court, and if repeated was calculated to undermine public confidence in the Federal Court.

Assertion that there is no public confidence in the judiciary

There was a clear assertion in the first defendant's resolution that there was a need to fully restore the public's confidence in the Malaysian judiciary.

In *Re Muhammad Wasim* (1933) 34 Cr LJ 726, a leading advocate in the course of a speech at a meeting of a bar association said 'the man in the street has lost confidence in the administration of justice in the province'. The court held that the use of the expression constituted contempt of court, but that as the offence was committed unconsciously and as the advocate tendered a written apology to the court, the apology could be accepted as sufficient amends. To my mind such utterances as contained in the resolution are clearly contemptuous. It is obviously an attempt to erode public confidence in the judiciary, by the very persons whose avowed vocation ought to be to protect it.

Attack on the independence of the judiciary

In *Aswini Kumar v Arabina Bose* AIR 1953 SC 75 where a newspaper article while criticising a Supreme Court decision not merely preached the courts of law the sermon of divine detachment from extraneous considerations such as politics and policies but also proceeded to attribute improper motives to the judges, it was held that the article not only transgressed the limits of fair and *bona fide* criticism but had a clear tendency to affect the dignity and prestige of the court and therefore amounted to gross contempt of court.

Mahajan J of the Supreme Court held at p 76 as follows:

> No objection could have been taken to the article had it merely preached to the courts of law the sermon of divine detachment. But when it proceeded to attribute improper motives to the judges, it not only transgressed the limits of fair and 'bona fide' criticism but had a clear tendency to affect the dignity and prestige of this court. The article in question was thus a gross contempt of court. It is obvious that if an impression is created in the minds of the public that the judges in the highest court in the land act on extraneous considerations in deciding cases, the confidence of the whole community in the administration of justice is bound to be undermined and no greater mischief than that can possibly be imagined.

In the case before me the defendants do not give any room for the public to deduce or analyse the question of the independence of the judiciary. The defendants state as a fact that the confidence in the independence of the judiciary has been undermined.

Provisions in the constitution to act against judges

It is clear that there is no legal provision for the defendants to call for the setting up of a Royal Commission of Inquiry. The way to remove a judge whether of the Federal Court, Court of Appeal or the High Court is set out in art 125 of the Federal Constitution. In his book *An Introduction to the Constitution of Malaysia*, Tun Mohamed Suffian, the former Lord President of the judiciary said at p 97:

> To ensure that the courts can without fear or favour do their duty, there are several provisions in the constitution designed to secure their independence so that they are not subject to control either by the legislature or the executive.

His lordship continued:

> The procedure for removing a judge is given in art 125(3), (4) and (5).

It is not that a judge is not subject to the scrutiny of the public and his peers. The provisions of the constitution affecting his appointment and removal form the bastion for the protection of the independence of the judiciary. A proper and systematic procedure to scrutinise and act upon a recalcitrant judge is provided for. Any other procedure suggested, moved or adopted would be tantamount to infringing upon and impinging on the independence of the judiciary. All the more is it surprising that the very body that seeks to protect the independence of the judiciary is attempting to insidiously erode that very independence the judges so fervently cherish.

This call for a Royal Commission of Inquiry is an attempt to by-pass a constitutional safeguard because under this constitutional procedure pursuant to art 125 of the Federal Constitution there are no provisions for making such vague and opaque general allegations against the entire judiciary. Pursuant to the procedures set out, the complaint must be specific and the judge against whom such a complaint is to be made, must be properly identified to enable him to defend himself. Such a procedure was properly adopted when certain judges of the Federal Court were tribunaled and some even found guilty.

Hickling in his *Malaysian Public Law* states at p 227 as follows:

> The independence of the judiciary is one of the foundations of the Constitution. It is sought to be ensured by complex rules relating, first to the appointment of judges, next to criticism of their behaviour as judges, then to the power of a court to punish any contempt, and finally, in relation to the removal from office of a judge. At the same time, the impartiality of the judge is ensured by arts 48(1) and 160, by virtue of which the office of judge is an 'office of profit', in consequence of which a judge is disqualified from being a member of either House of Parliament.

This attempt to surreptitiously circumvent art 125 by the very officers of the court who appear before the judges lends weight to the submission of the plaintiff that the defendants' conduct is mala fides. Judges by the nature and tenure of their office cannot speak out. They have no one to represent them to air their grievances. They are targets for abuse, formerly through poison-pen letters and lately through the internet. Yet stoically they soldier on, wading through carping criticisms levelled against them by the vanquished adversaries and like in the present, facing resolutions initiated by the very hand that ought to give it succour.

Sub-judice

It is obvious that by attempting to discuss the matters arising out of the Kuala Lumpur High Court Civil Suit No S2–23–42–1996 which is pending continuation of trial, since a stay had been granted by the Court of Appeal upon an interlocutory issue, the members of the third defendant and the first and second defendants would be discussing issues that are clearly *sub judice*. Further, the attempt to discuss contempt cases already decided by the High Court is still prohibited because of the pending appeals to the Court of Appeal. Preamble 2(b) to the resolution attempts to discuss the said contempt cases and defamation cases.

Dr Sir Hari Singh Gour, the eminent Indian jurist, in his *The Penal Law of India* (10th Ed) says at p 4172 with regard to the right of the public to comment on the cases and the persons connected therewith:

> ... The right of the public to such discussion, however, only arises when the case is decided and not when it is sub judice; any comment at that stage would be contempt of court as having a tendency to prejudice the due administration of justice.

Further in the same page he continues:

> ... And since the right arises as soon as the case is decided, the critic need not await the chances of an appeal, though, he is necessarily silenced as soon as the appeal is filed, for the case is then again *sub judice*.

At this juncture it is appropriate to cite a passage from *Chandra Sri Ram v Murray Hiebert* [1997] 3 MLJ 240. This is what my learned brother Low Hop Bing J said at p 270:

> Comment on pending proceedings with a tendency to prejudice fair trial and scandalizing the judges or the courts are some of the chief forms of contempt (per Hidayatullah CJ of the Indian Supreme Court in *EM Sankaran Namboodiripad v T Narayanan Nambiar* 1970 AIR 2015 at p 2018, para 6). In respect of scandalizing the judges or the courts, the learned Chief Justice added that this occurs when the conduct of a person tends to bring the authority and administration of the law into disrespect or disregard. In this conduct are included all acts which bring the court into disrepute or disrespect or which offend its dignity, affront its majesty or challenge its authority. Such contempt may be committed in respect of a single judge or a single court but may in certain circumstances be committed in respect of the whole of the judiciary or judicial system.

KJ Aiyar in his *The Law of Contempt of Courts, Legislatures and Public Servants* (6th Ed) said at p 323 with regard to *sub judice* matters as follows:

> Comments in regard to the merits of a pending case, whether they be made in newspaper articles or through leaflets or pamphlets, or criticisms offered on public platforms, or by way of resolutions, etc., should be scrupulously avoided. The fundamental reason behind it is, that the court having seisin of the case will arrive at a conclusion, on the basis of the evidence and materials that will be placed on record by the parties to a litigation. Extraneous comments, based mostly on surmises or unauthorised versions furnished by interested parties, are of no avail, when the matter is to be adjudicated upon in a court of law. Such extraneous comments may have the mischief of harming a party to a case if the comments have a tendency to prejudice mankind in favour of one party and against the interests of the rival party to the case which is already in court for disposal of merits.

It is obvious that based on all these authorities that by discussing such matters, the defendants and the members of the third defendant could face a possible charge of contempt is not something that this court can disregard. As for the fresh resolution proposed to be included which suggests that this very same injunction sought by the plaintiff be discussed at the EGM it is my judgment that such a resolution totally falls within the sub judice rule.

Ultra vires

It is the plaintiff's case that the proposed meeting and the resolutions tabled are *ultra vires* the powers conferred to the defendants pursuant to the LPA. A point raised by the plaintiff merits consideration. The Bar is not a voluntary or free organisation. It is a creature of statute with compulsory membership in that if an advocate and solicitor is not a member and had not paid his dues he could not practise at the Bar. In *DP Vijandran v Majlis*

Peguam [1995] 3 MLJ 576 (CA), Gopal Sri Ram JCA said at p 593 as follows:

> The Bar Council is a creature of statute. It has only those powers that are conferred upon it by the LPA. Whenever its actions are challenged, the onus lies upon it to demonstrate under what provision of the LPA it purports to act.
>
> As a creation of statute, the Bar Council has been conferred with certain powers to manage and administer its affairs. These are all general in nature and they are to be found in Pt V of the LPA, and more particularly in ss 56 and 57 thereof. As was put to counsel in the course of argument, ss 56 and 57 of the LPA are to the Bar Council what a memorandum of association is to a limited company — nothing less, nothing more.

In an affidavit affirmed by Mr Chelvarajah (encl 8) the deponent states at para 8 the reasons for the council's concern. I reproduce the same for clarity:

> 8 The reason for the Bar Council's concern is clearly because the Malaysian Bar is enjoined by the provisions of the Legal Profession Act 1976 inter alia:
>
> 8.1 to uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour;
>
> 8.2 to represent, protect and assist members or of the legal profession in Malaysia and to promote in any proper manner the interests of the legal profession in Malaysia; and
>
> 8.3 to protect and assist the public in all matters touching ancillary or incidental to the law.

It would seem, from a perusal of the LPA that each of these sub-paragraphs is based on s 42(1)(a), (e) and (g) respectively of the LPA. To my mind, none of these subsections can be said to provide the defendants with a right to propose the resolutions in question. In fact sub-paragraph (e) seems to cast upon the defendants the duty to ensure that they conduct themselves 'in any proper manner'. In my judgment acting *ultra vires* the provisions, namely, to by-pass art 125 of the Federal Constitution and to call for a Royal Commission of Inquiry clearly does not fall within any of the objects and powers conferred upon the Bar pursuant to s 42 of the LPA. In fact, with regard to sub-para (e), far from protecting the members' interest the defendants are exposing their members to possible charges of contempt and sedition. If the defendants cannot slot their case within any of the provisions of s 42, then clearly their conduct is ultra vires. Obviously the plaintiff being a member of the third defendant has a right to act to sue to restrain the defendants from committing an act which is ultra vires. In *David Lau Tai Bek v Lau Ek Ching Sdn Bhd* [1972] 1 MLJ 217 Sharma J said at p 219:

> ... A member can always sue for wrongs done to himself as a member. The individual rights of a member arise in part from the contract between the company and himself and in part from the general law. He is entitled to restrain the company from doing acts which are ultra vires.

Although in *David Lau* the matter was between a shareholder and the company, it is my judgment that the plaintiff herein is equally entitled to prevent the commission of an act which is ultra vires.

Sedition

The plaintiff contends that the proposed meeting and the proposed resolution contravene s 3(1)(c) of the Sedition Act 1948. The plaintiff argued that by committing acts which bring the judiciary into contempt the defendants are actually engendering disaffection amongst the public against the judiciary and thus exposing themselves to a possible charge under s 3(1)(c) of the Sedition Act 1948. The plaintiff pointed out that since all appointments of judges are made by the Yang di-Pertuan Agong the judges are His Majesty's judges. Mr Lim for the defendants strongly opposed this argument and submitted that since judges swear allegiance to the Constitution they cannot be construed as the King's judges. Mr Vijandran contended that if a resolution that judges are incompetent, have no integrity and are not independent, is proposed and/or passed such aspersions as contained in the resolution clearly would reflect upon the appointing authority, namely, the Yang di-Pertuan Agong. Borrie & Lowe on *The Law of Contempt* (3rd Ed) cites a passage from the judgment of Wilmot J in *R v Almon* [1765] Wilm 243 at p 255 as follows:

> The arraignment of the justice of the judges, is arraigning the King's justice; it is an impeachment of his wisdom and goodness in his choice of his judges and, excites in the minds of his people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the law is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever .... To be impartial and to be universally thought so are both absolutely necessary for ... justice ... .

The conduct of the defendants and the members of the third defendant if allowed to attend the EGM and to discuss the resolutions would appear to constitute an offence under s 4(1)(a) read together with s 3(1)(c) of the Sedition Act 1948. However, it is not my duty to make any finding as to whether an offence has or has not been committed under the said sections. This is for the Public Prosecutor to decide, if at all. In any event, it is my judgment that the plaintiff in actual fact is protecting the defendants from plunging into an abyss from which they cannot emerge unscathed. In *The Crown v A Rafique & Ors* (1950) 37 AIR 1 a resolution was passed by a bar association. It was asserted therein that by inflicting undeserved insults and persistently treating 'the members of the bar in general and the displaced lawyers in particular' in a contemptuous manner, the Chief Judge was making it impossible for the advocates to present their cases adequately and that if there was a further repetition of this behaviour, the association would be forced to take measures which it sincerely wished to avoid and further the resolution was communicated to the press and also to several persons by the bar association. The displaced lawyers were those who were left in Pakistan after India and Pakistan were divided as a result of the partition. The full bench of the Sind Chief Court held that the passing of the resolution at the meeting of the bar association and the publication of the resolution were acts which constituted a contempt of court.

Having considered all matters and issues raised, I am of the view that the justice of the case from all fronts point conclusively to the fact that it is appropriate to grant the plaintiff his interim injunction. As I said earlier I have warned myself that such an order would effectively give full judgment to the plaintiff. But that need not be so. The plaintiff is not seeking, nor would I have entertained even if asked, the prayer for a permanent injunction at this stage. After all, when the application for the permanent injunction is heard during the trial and if the defendants have other and better reasons that they might come up with for the court's consideration, the court is always receptive to change. I therefore grant the plaintiff his prayer for an injunction to restrain the defendants by themselves and/or their servants and/or agents from holding an EGM scheduled to be held on 20 November 1999 at the Grand Ballroom, Renaissance Hotel, Kuala Lumpur, with costs.

Before I conclude, there is one other matter that I must make mention of. I commend the plaintiff's brave conduct in pursuing this matter in the face of such daunting opponents. The plaintiff was single-handedly taking on the entire bar. He was prepared to face the prospect of having substantial costs awarded against him. Without fear and trusting upon the belief that justice will be done, he alone embarked on this tiresome yet fearsome venture. I must also commend Mr Vijandran for the excellent research he had done and in the manner of his presentation. He canvassed each and every argument with great tenacity.

Plaintiff's application allowed.

Reported by Jafisah Jaafar